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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 652

FARBENFABRIKEN BAYER A.G., *Petitioner*

v.

STERLING DRUG INC., *Respondent*
[Accounting Case]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
The General Joint Aspirin Business	6
Separate Companies in Chile and Argentina	8
Termination of the Business Relationship	11
Demand for Accounting	12
Relief Requested	12
Restraint on Competition	14
Prior Proceedings	14
Basis for the Decision Below	16
REASONS WHY THE WRIT SHOULD BE GRANTED	16
I. The Decision Below Is In Plain Conflict With This Court's Ruling in *Kelly* v. *Kosuga*	18
II. The Decision Below Establishes a Dangerous Precedent Affecting the Security of Property Rights in International Trade	24
CONCLUSION	30
APPENDIX A	1a
APPENDIX B	8a

TABLE OF AUTHORITIES

American Banana Co. v. *United Fruit Co.*, 213 U.S. 347	26
Bruce's Juices v. *American Can Co.*, 330 U.S. 743	19
Continental Wall Paper Company v. *Louis Voight & Sons*, 212 U.S. 277	19

Page

Kelly v. *Kosuga*, 358 U.S. 516 ..... 3, 17, 18, 19, 20, 21, 22, 24, 30
Pullman's Palace Car Co. v. *Central Trans. Co.*, 171 U.S. 138 19
Reynolds Metal Co. v. *Metal Disintegrating Co.*, 8 F.R.D. 349, Aff'd, 176 F. 2d 90 (C.A. 3, 1949) 27
Ring v. *Spina*, 148 F. 2d 647 (2d Cir. 1945) 28
United States v. *Curtis-Wright Export Corporation*, 299 U.S. 304 26
United States v. *General Electric*, 115 F. Supp. 835 (D.N.J., 1953) 29
United States Gypsum Co. v. *National Gypsum Co.*, 352 U.S. 457 19
United States v. *Imperial Chemical Industries*, 100 F. Supp. 504 (S.D. N.Y. 1951) 26
D. R. Wilder Mfg. Co. v. *Corn Products Ref. Co.*, 236 U.S. 165 19

STATUTES AND MISCELLANEOUS:

Sherman Act, Section 1, 26 Stat. 209 (1890) 15 U.S.C. § 1 ..... 3, 18, 19, 21, 26, 27
28 U.S.C. § 1254(1) 2
German Law Against Restraints of Competition of July 27, 1957, 1 Bundesgesetzblatt 1081 ..... 17, 29
Organization for European Economic Cooperation (OEEC), Guide to Legislation on Restrictive Business Practices (1960) 17
Treaty Establishing the European Economic Community, effective January 1, 1957 ..... 17, 29

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Farbenfabriken Bayer A.G., petitioner herein, by its attorneys, prays that a writ of certiorari issue to the Court of Appeals for the Third Circuit to review the decision of that Court in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit affirming the Judgment of the District Court, reported at 307 F.2d 210, is appended hereto as Appendix A, p. 1a.

The opinion of the United States District Court for the District of New Jersey granting respondent's motion for summary judgment and denying petitioner's cross-motion reported at 197 F. Supp. 613, is appended hereto as Appendix B, p. 8a.

JURISDICTION

This case seeks review from a Judgment of the United States Court of Appeals for the Third Circuit entered on August 9, 1962. A Petition for Rehearing was filed on August 24, 1962 and was denied on September 11, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Can respondent appropriate to its own use property rights of petitioner, in a joint business with respondent in the sale of aspirin in Latin America, merely because the agreement, within the framework of which such business was conducted between the two world wars, contained a prohibition of competition by the parties with the joint business?

2. Can property rights of petitioner, as beneficial owner of corporate stocks in jointly held companies, be appropriated by respondent for its own use on the ground that such shares were paid for, and payment therefore was accepted by respondent, out of profits

of a joint business, with which petitioner and respondent, the partners in such business, were restrained from competing?

3. Can final or the lump sum payment of amount due on an accounting for property interests in joint businesses now terminated be considered as "enforcing the precise conduct made unlawful by the Act" as defined in this Court's decision in the *Kelly* v. *Kosuga* and similar cases?

4. Can the defense of illegality under the antitrust laws be permitted to result in the unjust enrichment of respondent where the fact that the agreement contained a provision in violation of the antitrust laws could not have been known to the parties at the time the agreement was concluded in 1920, but became evident only as a result of the much later development of the antitrust laws through their administrative and judicial interpretation?

5. Is the defense of illegality under the antitrust laws available to a party to an agreement who has coerced the other party to enter into the agreement?

STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §1 reads in pertinent part:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *"

STATEMENT OF THE CASE

Petitioner, Farbenfabriken Bayer A.G., is a corporation organized under the laws of the Federal Republic of Germany. It was established in 1953 as a successor to I.G. Farbenindustrie, A.G. (hereinafter referred to as I.G. Farben). I.G. Farben in 1925 had succeeded to the business conducted since 1863 by Farbenfabriken vorm. Friedrich Bayer & Co. (Stipulation 2, App. 62a).[1]

Respondent herein is Sterling Drug Inc., a corporation organized under the laws of Delaware. It is the legal successor to Sterling Products, Inc., and to the Bayer Company, Inc., a New York corporation (hereinafter referred to as "New York Bayer"). New York Bayer was a subsidiary first of petitioner and later of respondent. It was merged into the respondent in 1942.[2] (Stipulation 3, App. 61a)

Petitioner, German Bayer, is a large German chemical firm. It and its predecessors have been in business since 1863. Its name is associated with the discovery of aspirin.

Prior to the outbreak of World War I, German Bayer, through its local Latin American subsidiaries,

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[1] For convenience petitioner and its predecessors, I.G. Farben and Farbenfabriken vorm. Friedrich Bayer & Co., are hereinafter sometimes referred to individually or collectively as "petitioner" or as "German Bayer."

The succession of petitioner to I.G. Farben, though denied by respondent, was assumed by both the District Court and the Court of Appeals and accordingly is not in issue on the present petition.

[2] Sterling Drug Inc., and its predecessors or subsidiaries are hereinafter sometimes referred to either individually or collectively as "respondent" or as "Sterling."

built up a well-established and valuable pharmaceutical business in Latin America. A very important part of this business was the sale of aspirin products under the trademarks "Bayer," "Bayer" spelled in a cross form with a circle (hereinafter referred to as the Bayer Cross), and "Aspirin," still a valuable trademark in most of the Latin American countries.[a] (App. 16a)

Sterling, on the other hand, did not, prior to World War I, conduct any aspirin business in Latin America. Sterling was not then in any way connected with German Bayer, nor did it have any rights to the Bayer trademarks. (Stipulation 4, 5, App. 61a)

Sterling came into the picture only after the outbreak of World War I when in 1918 it purchased from the United States Alien Property Custodian the capital stock of New York Bayer. New York Bayer prior to seizure by the Alien Property Custodian had been a wholly-owned subsidiary of German Bayer. Stipulation 4, 5, 7, 8, App. 61a-62a)

Through this purchase Sterling acquired control over the United States registrations to the trademarks "Bayer," "Bayer Cross" and "Aspirin." Since the operations of New York Bayer had been limited to North America, New York Bayer at the time of its acquisition by Sterling had no rights in Latin America. (Stipulation 4, 5, 7, 8, App. 61a, 62a). However, based on the United States registrations to these trademarks, Sterling was able to secure in a number of Latin Amer-

[a] Unlike the situation in the United States today where Aspirin is a generic term, it was and continues to be in many countries a valid trademark.

ican countries registrations to these and other trademarks which had been employed by German Bayer in Latin America. (App. 16a)

The General Joint Aspirin Business

On October 28, 1920, after a series of acts by Sterling which petitioner contends amounted to coercion, (Stipulation 11, App. 62a, Complaint para. 12, 13, App. 7a), German Bayer and Sterling concluded an agreement providing that the established valuable Latin American aspirin business of German Bayer should henceforth be conducted as a joint business. The text of the agreement is attached to the complaint as Exhibit A (App. 15a).

The stated purpose of the 1920 agreement was "to develop a large business in South and Central America and Mexico . . . for the purpose of exploiting acetylsalicylic acid (Aspirin) or its compounds in connection with the trade-mark aspirin, the trade name Bayer and the trademark referred to as the Bayer Crossmark or under any other trademark or name . . ." (App. 15a)

The parties jointly conducted a business in aspirin products in Latin America from 1920 until sometime in 1941. (Stipulation 16, App. 63a). The joint business, within the framework of the 1920 agreement, was organized as follows:

(a) As provided for in the agreement, the business utilized as its exclusive agencies in nearly all the larger Latin American countries, the established subsidiaries of German Bayer which prior thereto had acted as agencies of the aspirin business built up and operated by German Bayer. These subsidiaries of German

Bayer performed all functions necessary for the operation of the business on the local level. They imported the aspirin powder, tableted and packaged the aspirin and advertised and sold the finished product to the public. The services of these subsidiaries were supplied by German Bayer at cost (Stipulation 17, App. 63a).

(b) The business utilized the existing reputation and goodwill of German Bayer in Latin America by using the trademarks "Bayer," "Bayer Cross" and "Aspirin" which had previously been used by German Bayer on its aspirin, and continued to be used by German Bayer on all of its other pharmaceutical products sold in Latin America. For purposes of its aspirin business, German Bayer gave to New York Bayer a non-exclusive license to these trademarks.[3] (Paragraphs 2, 5 of Agreement, App. 15a, 16a).

c. The aspirin powder, which under the agreement was to be supplied at cost by the party able to do so at the lowest cost, was supplied by German Bayer at least during the period from 1920 to 1939. (Stipulation 18, App. 63a).

d. The local companies, which served as agencies of the joint business in the various Latin American countries, pursuant to the terms of the agreement, as far as the sale of Bayer aspirin was concerned, were under the immediate supervision, direction and control of Sterling. (Stipulation 17, App. 63a). The policy decisions, however, pursuant to which such control was exercised, were made at periodic meetings held between leading officials of the two companies. At these meet-

[3] Under the agreement Sterling reassigned to German Bayer those of the former German trademarks which Sterling had registered in Latin America since 1919 (Paragraph 5 of Agreement, App. 16a).

ings the major, and many relatively minor questions, relating to the business were discussed and joint decisions reached. (See Exhibits to Supplemental Affidavit of Werner J. Kronstein, App. 172a et seq.).

e. The joint business was a separate bookkeeping entity. The books of the business were kept by Sterling. Sterling, as bookkeeper of the business, arranged for the payment of all business expenses out of the proceeds of the joint business. Each year Sterling prepared an independently certified final statement of the profits from the sale of aspirin. In computing such profits it deducted all expenses permitted under the 1920 contract. (Stipulation 21, 64a).

f. Under the agreement 75% of the profits were due to petitioner and 25% to respondent. As the funds representing the profits were received from such various Latin American countries, 75% of the profits were paid to petitioner and 25% retained by defendant. The last payment of profits to petitioner was made in the summer of 1941. (Stipulation 22, App. 64a).

Separate Companies in Chile and Argentina

In addition to the joint aspirin business conducted within the framework of the 1920 agreement, which is here referred to as the "general joint aspirin business," petitioner and respondent also jointly held interests in two companies, one in Chile and the other in Argentina, both of which were engaged in the manufacture and sale of aspirin compounds.

(a) Laboratorios Hegemann—Chile

In 1937 German Bayer and Sterling acquired the busniess of Laboratories Recalcine, a Chilean company which sold an aspirin compound under the name "Ali-

viol." The "Aliviol" business acquired from Laboratorios Recalcine was transferred to a company called Laboratorios Hegemann y Cia., Ltda., which had been organized for that purpose. (Stipulation 27, App. 66a).

This business was acquired 75% for German Bayer's account and 25% for Sterling's account. However, the entire purchase price for this company was initially advanced by Sterling. Sterling agreed to:

> "*keep in trust for you* [German Bayer] *as property of your Company* the 75% share in Laboratorios Hegemann y Cia., Ltda., Santiago de Chile, until such time as the credit has been refunded." (Emphasis supplied) (Aff'dt. Exhibit A, App. 143a).[4]

(The Third Circuit apparently construed this transaction as a purchase by petitioner of 75% of the interest respondent had previously acquired in Hegemann. This construction is, in our view, inconsistent with the stipulated facts and with other evidence in the record, including the above quoted letter. This, however, is of no consequence to the legal issues presented here.)

Plaintiff, by August 1940, had repaid in full with 4% interest the amount which Sterling had advanced for its partner's 75% share of the purchase price. This payment was made as agreed by application to the debt of the profits of the "Aliviol" business and plaintiff's share of the profits under the 1920 contract in Chile. (Stipulation 29, App. 66a). Sterling, through nominees continued, however, to be record owner of plaintiff's interest in the Company and to be custodian of its shares even after the repayment of this debt. (Stipulation 28, App. 66a).

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[4] See also Stipulation 26, App. 66a.

(b) Laboratorios Suarry—Argentina

In 1937 and 1938 German Bayer and Sterling also acquired approximately 86% of the capital stock of Laboratorios Suarry S.A., a company selling an aspirin compound, "Geniol," in Argentina. The acquisition of this interest was made in two separate transactions.

In 1937 German Bayer and Sterling purchased 51% or 51,000 shares of the capital stock of Laboratorios Suarry. German Bayer acquired a 75% interest and Sterling a 25% interest in the shares. Sterling advanced the purchase price of German Bayer's 75% interest in these shares, this advance to be repaid out of German Bayer's share of the profits of the "Geniol" business and from its 75% share of its profits under the 1920 contract in Argentina. (Stipulation 31, App. 66a-67a). German Bayer agreed to pay 4% interest on the sums advanced. (Aff'dt. Exhibit B, App. 144a.) It was stipulated (Stipulation 34, App. 67a) that part but not all of the sums due were repaid when the contract was terminated but Sterling has refused to state the extent to which German Bayer was credited with repayment by 1941 or at any subsequent date.[5]

In 1938, the parties entered into an agreement with respect to the purchase of the Suarry shares in addition to the 51% already covered by the previous agreement. The terms of this agreement are set forth in a letter from German Bayer to Sterling dated April 19, 1938). (Stip. Exhibit D, App. 99a).

The entire 86% of the capital stock of Laboratorios Suarry in which either German Bayer or Sterling had

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[5] This amount is one of the items to be considered in the accounting prayed for by the complaint.

an interest were at all times voted at the direction of Sterling. (Stipulation 33, App. 67a). This was pursuant to a letter from petitioner to Sterling, dated November 9, 1938, by which German Bayer agreed that Sterling exercise on its "behalf all rights . . . and in particular voting rights . . . in respect of the [S] shares . . . acquired by us in so far and so long as the purchasing price expended by you for our account has not been repaid by us." (Aff'dt. Ex. C, App. 145a).

Termination of the Business Relationship

In 1941 a series of events occurred which lead to the termination of the business relationships between German Bayer and Sterling.

On August 14, 1941 Sterling sent plaintiff a telegram (Stipulation, Exhibit F, App. 105a) suggesting that because of present and proposed governmental restrictions the parties should "*terminate our joint Latin American business enterprises while conditions still permit our doing so on a negotiated basis,*" and containing a number of specific proposals to "*dissolve all contracts, agreements, understandings, partnerships and to divide jointly-held property and to terminate all obligations and rights resulting from the 1920 Latin American agreement.*" After a further exchange of telegrams, these proposals were rejected by German Bayer on August 27, 1941. There were no further negotiations between the parties until after the end of World War II. (Stipulation 36, and Exhibits F, G, H, I and J thereto. App. 68a, and 105a to 107a).

On September 5, 1941, the Department of Justice filed a complaint charging *inter alia,* that the 1920 agreement violated the antitrust laws of the United

States (Stipulation Exhibit M, App. 113a). On the same day Sterling entered into a consent decree which enjoined it from further performance of the provisions of the 1920 agreement. (Stipulation, Exhibit N, App. 121a). German Bayer was not a party to the proceedings in which the consent decree was entered nor to the decree itself.

Demand for Accounting

After World War II petitioner, determining that its property rights although subject to seizure, had not in fact been vested by the Alien Property Custodian, demanded an accounting for its interests in the general joint aspirin business and in Laboratorios Hegemann and Laboratorios Suarry. After negotiations, Sterling in May and June, 1955, advised German Bayer that it would not render any accounting for these property interests. (Plaintiff's Memorandum in Opposition to Motion Under Rules 12 and 56. Exhibits A, B, App. 58a(1). Accordingly, in September, 1955, petitioner filed the present complaint (App. 5a *et seq.*).

At no time did petitioner demand a resumption of joint business relationships. It desires to make a final termination of such business relationships, and accordingly asks only for an accounting of its property interests held by Sterling.

Relief Requested

Petitioner in its complaint seeks an accounting for the property rights in the joint business enterprise which had existed up until 1941.

The substance of the petitioner's claims are stated in the second and fourth causes of action. In the second cause of action, petitioner seeks an accounting for its

75% interest in the general joint aspirin business. In the fourth cause of action petitioner demands an accounting for its 75% interest in Laboratorios Hegemann and Laboratorios Suarry. The first cause of action is a partial particularization of the claim made in the second and fourth causes of action for funds held by Sterling as part of petitioner's interest in the businesses covered by the two causes of action.[6]

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[6] The Court of Appeals' summary of petitioner's second cause of action may be somewhat ambiguous. The opinion states that petitioner in its second cause of action seeks an accounting for

> "its rights in the aspirin business that defendant has been conducting in Latin America *after the agreements were declared illegal* [in 1941]."

It is perfectly clear from all papers filed below that petitioner claims a right to an accounting for its interest in the joint aspirin business conducted *prior to* 1941 and for its value as a going business in 1941. As petitioner stated on page 72 of its principal brief filed with the Court of Appeals

> "The question whether defendant must account for the aspirin business which it has conducted since 1941 depends, of course, upon the extent to which it has continued the business formerly conducted by the joint venture, whether it has started a new business and whether it has invested any of the resources of the joint venture in such a new business. If it is established in the accounting that defendant has substantially continued the same business then Sterling will have to account for the aspirin business conducted by it in Latin America since 1941, except during the period of the hostilities in World War II which is waived by paragraph 29 of the complaint (App. 12a). If, on the contrary, in the accounting Sterling is able to establish that it set up an entirely new business and has not used the good will, property, experience and personnel of the joint business, then of course the accounting will cease as of 1941."

The third cause of action is stated in the alternative as a claim for breach of contract in the event relief is denied on Count II. The third cause of action was not pressed in the courts below.

Restraint on Competition

The 1920 agreement contained a provision (paragraph 11, App. 18a) which bound both the American and German firms not to offer or market aspirin independently in competition with the joint business.

The provision in *toto* reads as follows (App. 18a):

> "11. New York and Leverkusen agree not to offer or market independently directly or indirectly Acetylsalicylic Acid or its compounds in the countries coming within this agreement except upon the terms and subject to the conditions of the agreement."

It was assumed in argument below by petitioner that this provision of the 1920 agreement was unenforceable as a restraint of competition under the Sherman Act insofar as it purported to prevent Sterling from competing with the joint business.[7] Petitioner urged that it was not trying to enforce this provision of the agreement but only to obtain an accounting of its property rights on the dissolution of the joint venture. Respondent argued that the provision quoted rendered the entire agreement "illegal" and that "therefore" petitioner could not complain if its property rights with respect to the Latin American business had been appropriated by Sterling.

Prior Proceedings

The District Court first dismissed the case on grounds that petitioner had no right to access to American

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[7] The non-competitive provision of course did not violate the antitrust laws insofar as it prevented the German firm from competing, since the foreign commerce of the United States would not be restrained by the failure of the German firm to compete in the Latin American market.

courts to enforce a claim to property which had been subject to seizure by the Alien Property Custodian during World War II even though it had not actually been seized. (148 F. Supp. 733) This dismissal was reversed by the Third Circuit. (251 F.2d 300). Upon remand respondent, on June 30, 1958, filed a Motion for Summary Judgment (App. 59a). The motion raised various issues including the defense of illegality, or *in pari delicto*, as well as statute of limitations and laches. This motion was held in abeyance by the District Court pending pretrial proceedings which resulted in a detailed stipulation of fact entered in September 1959 (App. 60a *et seq.*). Petitioner thereupon, on October 29, 1959, filed a cross-motion for summary judgment to establish its right to an accounting for its interest in the joint Latin American businesses (App. 139a).

The District Court granted respondent's Motion for Summary Judgment, 197 F. Supp. 613, holding *inter alia:*

1. That petitioner was not entitled to an accounting for its interests in the joint Latin American businesses, because its claim for an accounting was premised on the 1920 contract which contained a restraint on competition in violation of the antitrust laws of the United States.

2. That petitioner's claims were barred by the statute of limitations and laches.

On appeal the United States Court of Appeals for the Third Circuit, 307 F.2d 207, affirmed the judgment of the District Court dismissing the complaint, but did so on the sole ground that the relief could not be granted because petitioner's claims arose out of a contract violating the antitrust laws.

Basis For the Decision Below

The Court of Appeals held that the 1920 agreement was illegal because the "covenant not to compete" with the joint business "permeated and tainted the agreements." Footnote 1, 307 F.2d at 208.

The Court held that petitioner could not recover "the profits derived from the business conducted under the illegal agreements." Id. at 209. It regarded the Hegemann and Suarry share interests as obtained under illegal agreements because plaintiff's interest was paid for out of the profits arising from the 1920 agreement.[8]

A Petition for Rehearing was filed, but was denied by the Court of Appeals on September 11, 1962.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents an important question of the application of the antitrust laws to international trade. The decision below holds that an American partner to a joint Latin American business may appropriate its foreign partner's property where the business, otherwise legal, is conducted under an agreement in which the partners agree not to compete with the joint business.

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[8] In addition, the Court indicated that there was no joint venture because it found no provision in the 1920 agreement for joint control of the general joint aspirin business venture (although the record is clear that joint control was in fact exercised). It, however, found this immaterial, saying that even if there were a joint venture, recovery could not be had because what was sought were profits derived from the 1920 agreement. The Court also held that the fact that petitioner was unaware that the covenant violated the antitrust laws was no defense. Footnote 1, 307 F.2d at 208. The Court did not deal with the issue of coercion by Sterling to compel Bayer to enter into the agreement which had been reserved for trial.

The decision below is a direct violation of the rule of law laid down by this Court in *Kelly* v. *Kosuga*, 358 U.S. 516.

The decision also represents a dangerous precedent in that it exposes foreign partners in long term international dealings with American firms, and American partners in similar dealings with foreign firms to the risk of having their property appropriated by their partners. Under the Third Circuit's ruling an American firm, by invoking the defense of illegality, is permitted to enrich itself at the expense of its European partners even if, only many years after the conclusion of an agreement between them, it becomes apparent, through subsequent judicial and administrative interpretations of the antitrust laws, that the continued participation of the American partner in the agreement is violative of these laws. This ruling casts a cloud of insecurity over property interests entrusted or arising out of every agreement between major American and foreign firms, as no such agreement can be entirely free of possible antitrust implications.

Nor can American firms be secure that they will not suffer similar consequences. New antitrust statutes have recently been adopted by other important industrial countries, *e.g.*, the European Economic Community and the Federal Republic of Germany.[9] These laws are similar to the American laws in that they pro-

[9] Treaty of Rome, §§ 85 *et seq.*, effective January 1, 1958, and German Law Against Restraints of Competition of July 27, 1957, 1 Bundesgesetzblatt 1081. The text of these laws and those of other countries are reprinted in "Organization for European Economic Co-operation," (OEEC), Guide to Legislation on Restrictive Business Practices (1960).

vide that broad categories in agreements of restraint of trade "null and void." These laws are as yet uncertain in their application. At a subsequent time, the conduct of some American firms under these laws will no doubt be held to be illegal. If the ruling below is not reversed, it may well be adopted as a precedent by foreign courts to subject such American firms to expropriation of their properties by their European partners.

The decision below is thus not only an erroneous application of the rule of law laid down by this Court, but a menacing precedent both for American and foreign firms in their joint operations in a world market which is becoming increasingly subject to laws against restraint of competition, not only by this country, but by many other nations of the world.

The decision below makes the antitrust laws not merely a charter of economic freedom, but a device for unjust enrichment at the expense of the business partners.

I. The Decision Below Is In Plain Conflict With This Court's Ruling in Kelly v. Kosuga

The decision below is a departure from the consistent line of decisions of this Court, the most recent of which is *Kelly* v. *Kosuga*, 358 U.S. 516, which hold that the defense of illegality, or *in pari delicto*, is narrowly restricted, where Sherman Act violations are involved, to "where the judgment of the Court itself would be enforcing the precise conduct made unlawful by the Act." Except in this limited situation, it is explicit in this Court's rulings that the policy that one party should not be permitted to enrich itself unjustly by taking the property of another but not paying for it is "over-riding".

This is the theme which runs through all the decisions of the Court involving this defense which "has not met with much favor in this Court," *Kelly* v. *Kosuga*, 358 U.S. at 518. In *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743, 755 (1947), this Court, for example, in summarizing its previous holdings on this question, defined this defense as one entertained where a suit "has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought." There is only a single case in which this Court has sustained the defense of illegality, and that was *Continental Wall Paper Company* v. *Louis Voight & Sons*, 212 U.S. 277 (1909), and there only because the effect of a judgment for the plaintiff would have been, as this Court stated in *Kelly*, "to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." See also *Pullman's Palace Car Co.* v. *Central Trans. Co.*, 171 U.S. 138; *D. R. Wilder Mfg. Co.* v. *Corn Products Ref. Co.*, 236 U.S. 165 and *United States Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457.

Petitioner in this case is asking for an accounting for property which respondent retained in a fiduciary capacity for petitioner after the agreement within whose framework the joint businesses were conducted was terminated in 1941. Such a judgment of accounting and payment of funds found to be due thereon plainly could not "enforce the precise conduct made illegal by the Act" nor could it "make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." The illegal restraint contained in the 1920 agreement was the promise of Sterling not to compete with the joint business undertaking in Latin America. This restraint, not in effect since the termination of the agreement in 1941, cannot possibly be

revived, enforced, or effectuated in any way by granting relief to petitioner in this action. The decisions of this Court permitting the defense of illegality may be entertained only where a judgment for petitioner would have such results required the Third Circuit to strike the defense.

The Third Circuit's contrary action denying relief, on the ground that "recovery does not depend on a collateral obligation," but on the contract itself, is premised on a failure to recognize one of the essential points in this Court's holding in *Kelly*. For *Kelly* holds that illegality is "collateral" and not "inherent" if the promise sued on can be enforced without also enforcing "the precise conduct made unlawful by the Act."

The illegality here is plainly "collateral" to the promise sought to be enforced. What was "illegal" under the 1920 agreement was the promise of Sterling not to compete with the joint business and to make all its sales of aspirin in Latin America a part of the joint business. This promise is plainly not enforced by requiring Sterling to account for petitioner's property interests which existed in the joint businesses prior and up until 1941 when the agreement was terminated. Petitioner does not ask for any share of the profits from the business conducted by Sterling after the agreement was declared illegal in 1941, except insofar as an accounting might show that Sterling used what belonged to German Bayer.[10]

[10] For a more detailed discussion on the relief which petitioner seeks in this action, see "Relief Requested," *supra*, p. 12.

Under this Court's decision in *Kelly*, it is plain that the fact that an agreement contains a provision in violation of the antitrust laws does not make the entire contract "inherently" illegal, even though the illegal provision is not strictly "divisible" from the remainder of the contract.

In Kelly, there was a single contract containing (1) a promise to buy and pay for onions, and (2) a promise by both parties, in violation of the Sherman Act, not to sell any onions on the future markets for the purpose of maintaining an artificial price for onions. This Court held that while the later restrictive agreement could not be enforced by the Court, as this would enforce "the precise conduct" forbidden by the Act, the sales agreement represented an "intelligible economic transaction of itself," which could and should be enforced to prevent the unjust enrichment of the respondent. The Court deemed it not to be "inappropriate or violative of the interest of the parties" to give effect to the purchase agreement "even though it furnished the occasion for a restrictive agreement . . ."

In this respect this case is strikingly similar to *Kelly*. Here there is also a contract containing:

1. Provisions for the establishment and operation of a joint aspirin business in Latin America.

2. An agreement entered into at the "occasion" of the establishment of this joint business pursuant to which the parties agreed not to compete with this joint business in Latin America. As in *Kelly*, the latter promise could not be enforced because to do so would enforce a violation of the antitrust laws. However, as in *Kelly*, the principal part of the agreement plainly

represents an "intelligible economic transaction in itself."[11]

The Third Circuit, in its decision, also seems to have been led astray by its categorization of the relief petitioner is seeking as "profits arising directly from operations conducted by defendant and itself under the illegal agreements." The Third Circuit seems to have equated recovery of *profits* with a judgment which "enforce(s) the precise conduct made unlawful by the Act." This approach, however, is contrary to the decisions of this Court. It may well be that where the sole or principal basis for a profit sharing arrangement is the promise by one party not to compete with the other in a certain geographical area that the defense of illegality will be entertained. But the situation is entirely different where the basis for the profit sharing arrangement is a joint business undertaking which plainly represents "intelligible economic transaction" in itself.

The basis for the money payment which petitioner is seeking to recover in this action represents the value of petitioner's share in the joint aspirin businesses conducted by the parties in Latin America, and the return from the contributions which it has made to that business. These contributions included the goodwill of its Latin American aspirin business

[11] Indeed, we submit that the restrictive agreement in this case probably represented a less significant part of the entire bargain as did the restrictive provision in *Kelly*. When two parties enter into a joint undertaking of the kind established by the 1920 contract, it may generally be assumed the parties in their own interest will not compete with their joint endeavor. An agreement to buy and sell, however, does not imply or assume in any way that the parties thereto will not sell more of any of the same commodity on the market.

antedating the 1920 agreement, licenses to trademarks, the services of its established dealer organization supplied at cost and its aspirin products supplied at cost. The share of the profits to which plaintiff is entitled is in effect a payment for its contribution to and share in the joint business undertaking. The payment sought is not in any part a payment for the promise not to compete (this aside from the fact that the German firm was free, under its own then existing law and American law as well, to promise not to compete in Latin America). *The only vice under American law was in Sterling's promise not to compete with the joint business and that promise is neither sought to be enforced nor compensated by the present claim.*

The scope of the decision of the Third Circuit denying relief on the grounds that petitioner is seeking to recover "profits" arising, out of an illegal agreement, and what this means in terms of unjust enrichment is best exemplified by the case of Laboratorios Hegemann. This company was jointly purchased by petitioner and respondent in 1937. It was agreed that petitioner was to have a 75% share and respondent a 25% share in this company. Respondent advanced the money required for the purchase of petitioner's 75% share in this company, and agreed "*to keep in trust for you (petitioner) as property of your Company the 75% share in Laboratorios Hegemann y Cia., Ltda, Santiago de Chile, until such time as the credit has been refunded.*" (Afdvt. Exhibit A, App. 143a) Pursuant to this agreement between the parties, this debt had been repaid in full by August 1940 out of petitioner's 75% share in the profits of Laboratorios Hegemann, as well as from its 75% share of the profits of the general aspirin business in Chile. Since respondent continued as the record

owner of petitioner's interest in this company even after the debt had been repaid, in 1941 it was able to appropriate the entire business operated by Laboratorios Hegemann, a company in which petitioner owned 75% of the shares, by transferring its assets to another company in which respondent did not recognize any interest of petitioner. Stipulation 26-29, 47 App. 66a, 70a) This was a bald appropriation of property which respondent held as trustee.

The Court of Appeals, however, denied petitioner relief for the reason that the money which respondent had advanced for the acquisition of petitioner's interest in this company was repaid "out of the profits" of the 1920 agreement, as well as out of the profits of Laboratorios Hegemann.[12]

The practical result of the Court of Appeal's decision is to permit Sterling unjustly to enrich itself at the expense of petitioner by increasing its share in Hegemann from 25% to 100% without paying for it. Such a result in a case where a decree compelling the fiduciary to account would require a simple money payment which could not be regarded in any way as "enforcing" any illegal conduct cannot be squared with this Court's decision in *Kelly*. The decision below should be reviewed by this Court.

II. The Decision Below Establishes a Dangerous Precedent Affecting the Security of Property Rights In International Trade

The decision of the Court of Appeals adversely affects the present and future security of property rights in many long term commercial relationships where one of the partners is an American firm.

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[12] The Court of Appeals regarded the Hegemann profits as due to petitioner under the 1920 agreement.

Long time joint undertakings, similar to the business relationships in question in this case, are extremely common, and in many forms are not regarded to be in violation of the antitrust laws. Indeed, cooperation between foreign and American firms, particularly in under-developed countries, are important and desirable methods of cooperation between business enterprises, each contributing some of the elements necessary for the success of such a venture.[13]

A. It will be clear that any such form of cooperation, in particular where the parties are large business enterprises, can not be entirely free from antitrust implications. All the parties can do to assure compliance with the antitrust laws is to organize their business consistent with the judicial precedents and with the current views of antitrust experts. The partners to a long term agreement can not know how the interpretation and practice under the antitrust laws will evolve

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[13] The Honorable Teodoro Moscoso, United States Coordinator of the Alliance For Progress, stated in a speech before the Institute For International and Foreign Trade Law, Washington, D. C., April 10, 1962

> "I suggest to you that perhaps there is a real opportunity for creative and imaginative use of joint ventures and joint enterprises, mixing broad foreign equity participation, management techniques and technology with local resources.
>
> Such 'mixed' business organizations have many advantages *To the extent that they include participation by both European and North American firms they can draw on the wealth of experience and resources of all the developed free nations.* At the same time, such 'mixed' ventures can serve to develop expanded trade relations between Europe and Latin America, and perhaps also help to convince Europe of its vital interest in increased aid to the area, within the context of the Alliance and consistent with its goals." (Emphasis supplied).

in the future. Under the decision of the Third Circuit, however, their failure to predict correctly the development of antitrust laws may result in the appropriation of a company's property by its American partner.

The contract in question in this case was concluded in 1920. This was the time when the application and interpretation of the antitrust laws, especially in the field on international restraints of competition, was in a most rudimentary state. When the 1920 agreement was concluded, there was not a single decision holding that an agreement between an American and a foreign firm not to compete with a joint business enterprise conducted by the companies in a third country was an unreasonable restraint of competition in violation of Section 1 of the Sherman Act.[14] Nor in 1920 was there any other basis for concluding that such an agreement was or would be held to be in violation of the law. Indeed, it was not until 1951, ten years after this contract terminated, that a court held for the first time that such an arrangement constituted a violation of the Sherman Act. See *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504, 557 (S.D.N.Y. 1951).[15]

Petitioner, in the Court of Appeals, argued that under these circumstances the defense of illegality or *in pari delicto* may not be entertained, because the doctrine of *in pari delicto* pre-supposes equal fault or

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[14] Indeed, as late as 1936, this Court cited *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, with approval. See *United States* v. *Curtis-Wright Export Corporation*, 299 U.S. 304, 318.

[15] Sterling itself claimed (Appendix for Appellee, 28b) and it is not disputed that the first intimation it received of any question of the legality of the agreement was in 1941 when the Department of Justice began an inquiry. It did not advise petitioner of this question.

delicto on the part of the parties, and where, as here, the illegality of the conduct becomes apparent only as later development and interpretation of the antitrust laws, it was not possible to speak in terms of fault at all.

The Court of Appeals, in its decision, disposed of this issue by citing *Reynolds Metal Co.* v. *Metal Disintegrating Co.*, 8 F.R.D. 349 (D. N.J., 1948) Aff'd. 176 F.2d 90 (C.A. 3, 1949), wherein it is stated that "ignorance of the law . . . is no excuse." The application of this truism however, is plainly inappropriate in a case of this kind.

The antitrust laws, as will be recognized, do not spell out in detail, as criminal statutes generally must do, the precise acts which constitute a violation. The antitrust laws, and in particular Section 1 of the Sherman Act which is involved here, resemble more closely a constitution of economic competition. What comes within the prohibition of Section 1 of the Sherman Act has evolved continually and greatly since its enactment in 1890 through both the enforcement policies of the Justice Department and judicial construction. A person therefore may realistically only be chargeable with knowledge of the antitrust laws as interpreted today, and plainly can not be charged with knowledge of their future development, and that at the risk of forfeiting his property.

Of course, it is no defense to a government suit that the agreement was not recognized as illegal under the antitrust laws at the time it was concluded. Otherwise, by entering into a long term agreement, parties could assure themselves against government intervention under the Sherman Act. Nor is it possible to avoid new constructions of the law in private litigation in order

to insist on continued performance of agreements illegal by current standards.

An entirely different situation is presented, however, when one of the parties to an agreement which, as a result of a subsequent development of the antitrust laws becomes to be recognized as illegal, attempts to benefit therefrom by unjustly enriching itself at the expense of the other party by appropriating its property.

The court below permitted such appropriation of property even though, on summary judgment, it had to assume the allegations of complaint that petitioner entered into the 1920 agreement as the result of economic coercion exercised by respondent. (Complaint para. 13, 14, App. 7a; Stipulation 11, App. 62a.) In *Ring* v. *Spina*, 148 F. 2d 647 (2nd Cir. 1945) it was held that where one of the parties is a victim of economic coercion exercised by the other, the parties are not in *pari delicti*, and the defense of illegality does not apply.

If such consequences are to be attached to new developments in the law of antitrust, it should only be after the considered judgment of this Court.

B. The approach of the Third Circuit seems to be particularly inappropriate in light of the fact that the illegality of the 1920 agreement stems only from the fact that Sterling as an American firm could not, under the Sherman Act, agree not to compete with the joint aspirin business in Latin America. If petitioner had concluded this agreement with another foreign firm, it would have been legal and binding. The fact that Sterling's participation in the agreement violated American law may free it from its obligation to perform there-

under. It would be an analomous result, however, if Sterling, in addition to stepping out of the agreement, also could appropriate the property of its business partner. Surely such a rule cannot be fairly applied where both the business partner is incorporated in, and the business activities covered by the agreement "are conducted in areas of the world where different standards of industrial behavior prevail than are accepted in this country." *U.S.* v. *General Electric,* 115 F. Supp. 835, 852 (D.N.J., 1953).

C. The disturbing implications of the Third Circuit's decision can be most acutely felt if we consider that agreements to which American companies are partners may and probably will be found illegal under the new and still uncharted antitrust laws of the European Economic Community, as well as under the recently adopted antitrust laws of certain European countries. These antitrust laws are still in their rudimentary state, much as the American antitrust laws were in 1920, in particular, as applied to international restraints of trade. The antitrust laws of the European Economic Community, for example, forbid in fairly general terms agreements which have "the object or effect of preventing, restraining or distorting" competition and makes agreements of this kind "null and void." (Article 85 of the Treaty Establishing the European Economic Community, effective January 1, 1957. Cf Section 1 of the German Law Against Restraint of Competition, note 9, p. 17, *supra.* These provisions have not been authoritatively construed, and necessarily there are many questions as to their scope and meaning. It is impossible to anticipate with any degree of accuracy, therefore, how this and similar provisions will be inter-

preted, and to what type of arrangements they will be applied.

It would be grossly unfair if at some future date it should become evident that an agreement between a European and American company, now considered legal, violates the antitrust laws of the European Economic Community for the European company to be able to appropriate for itself the property which arose in connection with, or was transferred, under such an agreement. Under the ruling of the Third Circuit, however, the American company would be in a weak position to object to such a procedure as this would be equivalent to the treatment European companies receive in the United States.

The decision below is a dangerous precedent for American foreign trade as well as a direct violation of this Court's opinion in *Kelly* v. *Kosuga*. It requires review by this Court.

CONCLUSION

For the reasons stated the writ should be granted.

Respectfully submitted,

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